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ABSTRACT

This document contains a report on four Senate bills from the Wisconsin Legislature concerned with sexual assault. Part I of the report describes key provisions of the four bills: (1) 1991 Senate Bill 178, which codifies a 1987 Wisconsin Supreme Court decision on excluding certain persons from preliminary examinations in criminal sexual assault cases and revises current statutory language relating to permissive closure in criminal sexual assault cases; (2) 1991 Senate Bill 179, which revises certain crimes against children to replace older provisions; (3) 1991 Senate Bill 180, which revises the definitions of "sexual contact" and "sexual intercourse" as those terms are used in the criminal sexual assault laws; and (4) 1991 Senate Bill 181, which creates limitations on the discovery of information concerning a sexual assault victim's past sexual conduct in civil actions based upon conduct which constitutes sexual assault. Part II of the report discusses committee activity related to the four pieces of legislation. Parts III, IV, V, and VI describe Bills 178, 179, 180, and 181, respectively. A list of committee materials is appended. (NB)

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WISCONSIN LEGISLATIVE COUNCIL

REPORT NO. 4 TO THE 1991 LEGISLATURE

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LEGISLATION ON SEXUAL ASSAULT LAWS

1991 SENATE BILL 178, RELATING TO THE CLOSURE OF PRELIMINARY EXAMINATIONS IN CRIMINAL CASES INVOLVING SEXUAL ASSAULT, SEXUAL EXPLOITATION OR INCEST

1991 SENATE BILL 179, RELATING TO CRIMINAL LIABILITY BASED ON OMISSIONS OR CRIMINAL RECKLESSNESS AND PROVIDING PENALTIES

1991 SENATE BILL 180, RELATING TO SEXUAL ASSAULT, INTERCOURSE AND CONTACT

1991 SENATE BILL 181, RELATING TO LIMITATIONS ON DISCOVERY IN A CIVIL ACTION BASED ON SEXUAL ASSAULT OR SEXUAL EXPLOITATION

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(1) Appointed by a September 7, 1990 mail ballot to replace Judge John DiMotto, who resigned from the Committee on August 15, 1990.

WISCONSIN LEGISLATIVE COUNCIL
REPORT NO. 4 TO THE 1991 LEGISLATURE*

LEGISLATION ON SEXUAL ASSAULT LAWS

CONTENTS

		Page
PART I:	KEY PROVISIONS OF LEGISLATION	3
	A. 1991 Senate Bill 178, Relating to the Closure of Preliminary Examinations in Criminal Cases Involving Sexual Assault, Sexual Exploitation or Incest	3
	B. 1991 Senate Bill 179, Relating to Criminal Liability Based on Omissions or Criminal Recklessness and Providing Penalties	3
	C. 1991 Senate Bill 180, Relating to Sexual Assault, Intercourse and Contact	3
	D. 1991 Senate Bill 181, Relating to Limitations on Discovery in a Civil Action Based on Sexual Assault or Sexual Exploitation	4
PART II:	COMMITTEE ACTIVITY	5
	A. Assignment	5
	B. Summary of Meetings	5
	C. Committee and Council Votes	7
	D. Staff Materials	9

*Prepared by: Don Salm, Senior Staff Attorney

		Page
PART III:	DESCRIPTION OF 1991 SENATE BILL 178	11
	A. Background	11
	B. Major Provisions	12
PART IV:	DESCRIPTION OF 1991 SENATE BILL 179	13
	A. Background	13
	B. Major Provisions	15
PART V:	DESCRIPTION OF 1991 SENATE BILL 180	17
	A. Background	17
	B. Major Provisions	20
PART VI:	DESCRIPTION OF 1991 SENATE BILL 181	23
	A. Background	23
	B. Major Provisions	23
APPENDIX:	COMMITTEE MATERIALS	25

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*Prepared by: Don Salm, Senior Staff Attorney

PART I

KEY PROVISIONS OF LEGISLATION

A. 1991 SENATE BILL 178, RELATING TO THE CLOSURE OF PRELIMINARY EXAMINATIONS IN CRIMINAL CASES INVOLVING SEXUAL ASSAULT, SEXUAL EXPLOITATION OR INCEST

1991 Senate Bill 178 codifies a 1987 Wisconsin Supreme Court decision on excluding certain persons from preliminary examinations (i.e., "closure") in criminal sexual assault cases and revises current statutory language relating to permissive closure in criminal sexual assault cases to reflect the Court's statements on the scope of, and factors to be considered in ordering, such closure.

B. 1991 SENATE BILL 179, RELATING TO CRIMINAL LIABILITY BASED ON OMISSIONS OR CRIMINAL RECKLESSNESS AND PROVIDING PENALTIES

1991 Senate Bill 179 revises certain crimes against children to replace the individual "failure to act" provisions in these criminal statutes with a general omissions liability statute and an expanded definition of "criminal recklessness" applicable throughout the Criminal Code [chs. 939 to 951]. [The current definition of "criminal recklessness" applies only to crimes with death or great bodily harm as an element.] The Bill also creates an affirmative defense of "lack of emotional capacity" to criminal omissions liability.

C. 1991 SENATE BILL 180, RELATING TO SEXUAL ASSAULT, INTERCOURSE AND CONTACT

1991 Senate Bill 180 revises the definitions of "sexual contact" and "sexual intercourse," as those terms are used in the criminal sexual assault laws, in order to remove ambiguities and make the definitions more understandable. Also, the revised definition of "sexual intercourse" is placed in s. 939.22, Stats. (the general definition in the Criminal Code), thus making that definition applicable throughout the Criminal Code. The Bill also replaces the definition of "consent," as that term is used in the general sexual assault law, with a definition of "without consent" which emphasizes that there must be a freely given agreement "in fact" to have sexual intercourse or contact.

D. 1991 SENATE BILL 181, RELATING TO LIMITATIONS ON DISCOVERY IN A CIVIL ACTION BASED ON SEXUAL ASSAULT OR SEXUAL EXPLOITATION

1991 Senate Bill 181 creates limitations on the discovery of information concerning a sexual assault victim's past sexual conduct in civil actions based upon conduct which constitutes sexual assault. These limitations require a party seeking such discovery to establish: (1) specific facts showing good cause for the discovery; and (2) that the information sought is relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence.

PART II

COMMITTEE ACTIVITY

A. ASSIGNMENT

The Legislative Council established the Special Committee to Review Sexual Assault Laws and appointed its Chairperson by a May 24, 1990 mail ballot, based on September 8, 1989 and April 6, 1990 letters from Senator Barbara Ulichny. The Special Committee was directed to review the statutes relating to criminal prosecutions for sexual assault, including issues relating to: (1) admissibility of evidence; (2) the elements of offenses and definitions applicable to those offenses; (3) penalties; and (4) the interrelationship of criminal prosecutions and the filing of civil suits by alleged offenders against alleged victims of sexual assault.

Members of the Special Committee, other than its Chairperson, were appointed by a June 28, 1990 mail ballot. The membership of the Special Committee consisted of four Senators, four Representatives and eight Public Members.

B. SUMMARY OF MEETINGS

During 1990 and 1991, the Special Committee held five meetings, four at the State Capitol, in Madison, and one in the City of Milwaukee on the following dates:

August 14, 1990
September 13, 1990
October 18, 1990
November 26, 1990 (Milwaukee)
January 9, 1991

At the August 14, 1990 meeting, the Special Committee reviewed a staff paper: (1) analyzing current state criminal laws relating to sexual assault; and (2) describing the "rape shield" statute, which substantially limits the admission of evidence of prior sexual conduct of the alleged victim in a sexual assault prosecution. The Special Committee also heard testimony from Kenneth P. Casey, Chief, Appellate Division, Office of State Public Defender, and Audrey Renschen, Assistant District Attorney, Milwaukee County District Attorney's Sensitive Crime Unit, regarding the effect of recent Wisconsin Supreme Court and Court of Appeals cases on the scope and usefulness of the "rape shield" statute. The speakers emphasized that judicial constructions of that statute during the 1980's led to the holding of the Wisconsin Supreme Court in State v. Pulizzano, 155 Wis. 2d 633, 456 N.W. 2d 325 (1990), that the statute may be unconstitutional in its application to a particular case by denying the defendant's rights to confront witnesses and to compulsory process (i.e., the right to present relevant evidence).

At the September 13, 1990 meeting, the Special Committee heard testimony from Professor Frank Tuerkheimer, University of Wisconsin School of Law, relating to an alternative approach to the current rape shield statute which would recognize prior sexual conduct evidence as privileged and inadmissible, except pursuant to a waiver of the privilege by the victim or because admission of the evidence is compelled by the Constitution. He suggested that this approach would have several advantages over the current rape shield approach, including allowing the trial courts to operate more freely, establishing a clear and simple evidentiary standard and giving the victim the right to waive the privilege. The Special Committee also discussed separate proposals for revisions of the current rape shield statute offered by Committee Members Wellman and LaVigne. They noted that these proposals attempted to address many of the issues raised in the Wisconsin appellate court decisions and legal commentary regarding the deficiencies in the current Wisconsin rape shield approach. The Special Committee also discussed proposals offered by Chairperson Ulichny and Senator Burke, including a proposal to restrict the admission of evidence of the victim's manner of dress, based on a recent Florida law.

At the October 18, 1990 meeting, the Special Committee heard testimony from members of the Walworth County Children's Court Advisory Board relating to its proposals for changes relating to how courts treat offenders who sexually assault children. The Board made recommendations relating to: (1) judicial sentencing guidelines specific to sexual abuse of children; (2) legislative proposals needed to more effectively prosecute child sexual offenders and to better protect victims and their rights during criminal proceedings; and (3) recommendations for community and agency support in order to do an effective job in protecting children from sexual assault.

The Special Committee also heard testimony from Ann Ranfranz, Sexual Assault Counseling Unit, Milwaukee County District Attorney's Office, relating to the effect of the current rape shield law. Ms. Ranfranz noted that changes in the current rape shield law may not be necessary, adding that changing or weakening that law may be hard on victims, especially if the changes result in an increased number of reversals of trial court decisions on appeal.

The Special Committee also heard testimony from Gail Miles, a third-year law student at the University of Wisconsin-Madison, who was the victim of a sexual assault 10 years ago. She discussed the role of the rape shield law in her case and in other cases.

The Special Committee then heard testimony from Colleen O'Brien, Shamrock Health Care, Ridgeway, regarding the sexual assault nurses examiners program, a private, nonprofit nursing service in Madison which provides case management services for sexual assault victims.

Finally, the Special Committee heard testimony from Margaret F. Elath, Policy Development Coordinator, Wisconsin Coalition Against Sexual Assault, Madison, who discussed problems with the current sexual assault laws, including the need for an age differential in certain offenses involving consensual sex with a minor. She noted that there has been an increasing number of civil actions filed against sexual assault victims by defendants for libel or slander, a trend which will make victims reluctant to report sexual assaults in the future.

At the November 26, 1990 meeting, the Special Committee discussed and established a list of proposals which the Committee would consider at its final meeting, including those proposals relating to the rape shield law which the Committee members determined were worthy of further consideration.

At the January 9, 1991 meeting, the Special Committee discussed bill drafts relating to confidential communications to a sexual assault counselor; increased penalties for repeat violators of the child sexual assault laws; an age differential for certain sexual assault crimes involving children; sexual assault of a child by a person 18 years of age and older; closure of preliminary examinations in criminal sexual assault cases; definitions of "sexual contact," "sexual intercourse" and "without consent" for purposes of the sexual assault laws; criminal liability based on omissions and criminal recklessness; limitations on commencing or continuing a civil action based on an incident involving sexual assault where there is a pending sexual assault criminal action; and limitations on discovery in a civil action where there is a pending sexual assault criminal action.

The Special Committee voted to recommend drafts relating to closure of preliminary examinations in criminal sexual assault cases; definitions of "sexual contact," "sexual intercourse" and "without consent"; criminal liability based on omissions and criminal recklessness; and limitations on discovery in a civil action relating to a criminal sexual assault action. The Special Committee did not take up drafts relating to the rights of crime victims and revisions in the rape shield statute.

C. COMMITTEE AND COUNCIL VOTES

1. 1991 Senate Bill 178

At its January 9, 1991 meeting, the Special Committee to Review Sexual Assault Laws recommended that the Legislative Council introduce LRB-3034/1 (the draft which became 1991 Senate Bill 178) on a vote of Ayes, 14 (Sens. Ulichny, Burke, Adelman and Buettner; Reps. Lautenschlager, Coleman, Coggs and Harsdorf; and Public Members Barland, Fullin, LaVigne, Schultz, Shelton and Wellman); Noes, 0; and Absent, 2 (Public Members Barber and Donoghue).

At its April 18, 1991 meeting, the Legislative Council voted to introduce the draft by the vote of Ayes, 17 (Reps. Schneider, Clarenbach, Gruszynski, Kunicki, Linton, Panzer, Prosser, Travis and Wimmer; and Sens. Risser, Adelman, George, Helbach, Kreul, Leean, Lorman and Moen); Noes, 0; and Absent, 4 (Reps. Coggs and Zien; and Sens. Czarnezki and Ellis).

2. 1991 Senate Bill 179

At its January 9, 1991 meeting, the Special Committee to Review Sexual Assault Laws recommended that the Legislative Council introduce LRB-3182/1 (the draft which became 1991 Senate Bill 179) to the Legislative Council on a vote of Ayes, 13 (Sens. Ulichny, Burke, Adelman and Buettner; Reps. Lautenschlager, Coleman and Harsdorf; and Public Members Barland, Fullin, LaVigne, Schultz, Shelton and Wellman); Noes, 0; and Absent, 3 (Rep. Coggs; and Public Members Barber and Donoghue).

At its April 18, 1991 meeting, the Legislative Council voted to adopt a technical amendment to insert language approved by the Special Committee which was inadvertently omitted in the preparation of the final draft [LRB-3182/1]. The amendment was adopted by a vote of Ayes, 17; Noes, 0; and Absent, 4. The motion to introduce the draft, as amended, was also adopted by a vote of Ayes, 17 (Reps. Schneider, Clarenbach, Gruszynski, Kunicki, Linton, Panzer, Prosser, Travis and Wimmer; and Sens. Risser, Adelman, George, Helbach, Kreul, Leean, Lorman and Moen); Noes, 0; and Absent, 4 (Reps. Coggs and Zien; and Sens. Czarnezki and Ellis).

3. 1991 Senate Bill 180

At its January 9, 1991 meeting, the Special Committee to Review Sexual Assault Laws recommended that the Legislative Council introduce LRB-3033/2 (the draft which became 1991 Senate Bill 180) on a vote of Ayes, 12 (Sens. Ulichny, Burke, Adelman and Buettner; Reps. Lautenschlager, Coleman, Coggs and Harsdorf; and Public Members Barland, Fullin, Schultz and Shelton); Noes, 2 (Public Members LaVigne and Wellman); and Absent, 2 (Public Members Barber and Donoghue).

At its April 18, 1991 meeting, the Legislative Council voted to introduce the draft by a vote of Ayes, 17 (Reps. Schneider, Clarenbach, Gruszynski, Kunicki, Linton, Panzer, Prosser, Travis and Wimmer; and Sens. Risser, Adelman, George, Helbach, Kreul, Leean, Lorman and Moen); Noes, 0; and Absent, 4 (Reps. Coggs and Zien; and Sens. Czarnezki and Ellis).

4. 1991 Senate Bill 181

At its January 9, 1991 meeting, the Special Committee to Review Sexual Assault Laws recommended that the Legislative Council introduce LRB-3035/4 (the draft which became 1991 Senate Bill 181) to the Legislative Council on a vote of Ayes, 8 (Sens. Ulichny, Burke and Buettner; Reps. Coleman, Coggs and Harsdorf; and Public Members LaVigne

and Shelton); Noes, 6 (Rep. Lautenschlager; Sen. Adelman; and Public Members Barland, Fullin, Schultz and Wellman); and Absent, 2 (Public Members Barber and Donoghue).

At its April 18, 1991 meeting, the Legislative Council voted to introduce the draft by a vote of Ayes, 17 (Reps. Schneider, Clarenbach, Gruszynski, Kunicki, Linton, Panzer, Prosser, Travis and Wimmer; and Sens. Risser, Adelman, George, Helbach, Kreul, Leean, Lorman and Moen); Noes, 0; and Absent, 4 (Reps. Coggs and Zien; and Sens. Czarnezki and Ellis).

D. STAFF MATERIALS

The Appendix lists all materials received by the Special Committee. The following document, prepared by the Legislative Council Staff, may be of particular interest:

- Staff Brief 90-4, Analysis of Current Wisconsin Laws Relating to Sexual Assault (July 24, 1990; revised September 5, 1990).

This document and other materials listed in the Appendix to this Report are available at the Legislative Council offices.

PART III

DESCRIPTION OF 1991 SENATE BILL 178

A. BACKGROUND

A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony (i.e., a crime punishable by imprisonment in Wisconsin state prisons) has been committed by a defendant [s. 970.03 (1), Stats.].

In State v. Circuit Court of Manitowoc County, 141 Wis. 2d 239, 414 N.W. 2d 832 (1987), the Wisconsin Supreme Court held that the existing statutory language in s. 970.03 (4), which mandates closure of a preliminary examination (i.e., exclusion of certain persons from the hearing) in sexual assault, sexual exploitation or incest cases solely upon the request of the complaining witness, does not comport with the defendant's right to a public trial under the 6th Amendment to the U.S. Constitution if the defendant objects to the closure. The Court upheld that part of s. 970.03 (4) that permits the judge to exclude persons from the preliminary examination in sexual assault cases or crimes "against chastity, morality and decency."

The Court's opinion provides the following guidance to trial courts regarding the factors that must be established to create a reasonable basis for discretionary closure in a sexual assault case at the request of the complaining witness:

> When a complainant seeks closure under sec. 970.03 (4), the state must first advance a compelling interest which would be likely to be prejudiced absent closure, such as the need to protect a sexual assault victim from undue embarrassment and emotional trauma. Where the circuit court finds this or any other appropriately compelling basis for closure, it must narrowly tailor its closure order. In determining the breadth of the order, the circuit court must consider reasonable alternatives to full closure of the entire preliminary examination. In addition, the circuit court must articulate specific findings adequate to support closure. Factors...including the victim's age, psychological maturity and understanding, the nature of the crime, and the desires of the victim and the victim's family, may provide guidance in making these findings. The circuit court should give great, but not exclusive, weight to the desires of the victim,

> since this is clearly shown to be proper public policy as evidenced by the enactment of sec. 970.03 (4) [414 N.W. 2d at 839].

B. MAJOR PROVISIONS

In accordance with the Court's decision in State v. Circuit Court of Manitowoc County, supra, 1991 Senate Bill 178 deletes the mandatory closure provisions from the current statute. The Bill also revises the current permissive closure provision to reflect the Court's statements on the scope of, and factors to be considered in ordering, such closure.

With reference to permissive closure, the Bill provides:

1. If the defendant is accused of a crime under s. 940.225 (general sexual assault law), 948.02 (sexual assault of a child), 948.05 (sexual exploitation of a child) or 948.06 (incest with a child), the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others deemed by the court to be supportive of the families or otherwise required to attend, if the court finds that the state or the defendant has established a compelling interest which would likely be prejudiced if the persons were not excluded. The Bill specifies that among others, an interest which may be considered by the court as a compelling interest is the need to protect a complainant from undue embarrassment and emotional trauma.

2. In making its closure order, the court must set forth specific findings sufficient to support the order. In making these findings, the court must consider, and give substantial weight to, the desires, if any, of the complainant. Additional factors the court may consider in making these findings include, but are not limited to: the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family.

3. The court must make its closure order no broader than is necessary to protect the compelling interest and must consider any reasonable alternatives to full closure of the entire hearing.

PART IV

DESCRIPTION OF 1991 SENATE BILL 179

A. BACKGROUND

1. Williquette Decision

In State v. Williquette, 129 Wis. 2d 239, 385 N.W. 2d 145 (1986), the Wisconsin Supreme Court stated that the common law rule on omissions survived as part of Wisconsin criminal law despite the fact that a specific omissions statute was not codified in the 1956 revision of the Criminal Code. The Williquette case was decided primarily on the grounds that the conduct in that case involved more than an omission. The Court found that the defendant committed the crime of child abuse [under s. 940.201, 1985-86 Stats.] by engaging in overt conduct: leaving children in the care of their father despite knowing that he was abusing them. However, the Court expressly rejected the defendant's claim that an act of commission, rather than omission, is a necessary element of all crimes in Wisconsin. The Court discussed the basis for omissions liability in considerable detail.

The Court, in Williquette, stated that the essence of any crime is a wrongful "act." But this requirement can be satisfied by an omission to act where there is a legal duty to act. The Court cited the rule that a person can be liable for an omission where the omission causes a prohibited result and he or she: (1) has a legal duty to act; and (2) can physically perform the act. It is also required that the person's conduct satisfy any other culpability requirements for the substantive crime. The Court emphasized that recognizing omissions as the basis for criminal liability is not creating a common law crime because it does not define a separate substantive offense. Simple failure to act where there is a duty to act does not by itself constitute a crime. That failure must cause some proscribed result. The definition of proscribed results is found in the definition of the substantive crime caused by the omission.

The Williquette Court also held that a legal duty exists by virtue of the special relationship between parent and child, noting that parents have the duty to protect their children, care for them and do what is necessary for their care, maintenance and preservation. The parent has a duty to take action to stop instances of child abuse. The Court concluded that a breach of duty is an omission that can be the basis for criminal liability if the parent "knowingly acts in disregard of the facts giving rise to the duty to act."

2. Current Statutory "Failure to Act" Provisions

Chapter 948, Stats. (crimes against children), contains a number of "failure to act" provisions, created by 1987 Wisconsin Act 332 (in general, a product of the 1985-86 Legislative Council's Special Committee on Crimes Against Children). For example, the "failure to act" provision in the sexual assault of a child statute [s. 948.02 (3)] provides that in order to establish the commission of the offense, the state must prove all of the following:

a. The defendant is a "person responsible for the child's welfare," which is defined, for purposes of ch. 948, to include:

> ...the child's parent; guardian; foster parent; an employe of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child [s. 948.01 (3)].

b. The defendant has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child.

c. The defendant is physically and emotionally capable of taking action which will prevent the sexual intercourse or sexual contact from taking place or being repeated.

d. The defendant fails to take the action under item c, above.

e. The defendant's failure to act either (1) exposes the child to an unreasonable risk that sexual intercourse or sexual contact may occur between the child and the other person or (2) facilitates the sexual intercourse or sexual contact that does occur between the child and the other person.

Failure to act under this statute is a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

Other crimes created by 1987 Wisconsin Act 332 which contain "failure to act" provisions are ss. 948.03 (4) (physical abuse of a child), 948.04 (2) (causing mental harm to a child) and 948.06 (2) (incest with a child).

A number of prosecutors have complained about the difficulty of establishing criminal liability under these "failure to act" provisions,

noting, in particular, the problem of proving that the defendant is "emotionally capable" of taking action to prevent the harm.

B. MAJOR PROVISIONS

The omissions liability statute created in 1991 Senate Bill 179 codifies the common law rules of criminal liability for omissions, as recognized in recent court decisions such as State v. Williquette, supra. Under the Bill, criminal liability may be based upon an omission to act only if, under the circumstances: (1) the actor has a legal duty to act; (2) the actor is physically capable of performing that act; and (3) the crime charged is specifically prohibited by statute. The Bill specifies that a legal duty to act exists if the duty is specifically required by the statute defining the charged offense or is judicially recognized in case law.

With reference to crimes against children, the requirement that there be a legal duty to act is met by the provision of the Bill which specifies that a "person responsible for the child's welfare" has a duty to protect the child from sexual assault under s. 940.225 or 948.02, physical abuse under s. 948.03, mental harm under s. 948.04, and incest under s. 948.06, Stats. A "person responsible for the child's welfare" is statutorily defined; see Section A, 2, a, above.

Senate Bill 179 recognizes an affirmative defense to liability under the omissions liability statute, based on the defendant's lack of emotional capacity to perform his or her legal duty toward the child. Under the Bill, whenever the existence of the defense has been placed in issue by trial evidence, the state must prove beyond a reasonable doubt that the actor was emotionally capable of performing his or her legal duty in order to sustain a finding of guilt.

In addition to codifying the common law rules of omissions liability, Senate Bill 179 expands the current definition of criminal recklessness, which applies only to crimes involving the risk of death or great bodily harm, to apply to any offenses in the Criminal Code which have recklessness as an element. Under the revised definition, criminal recklessness means that the actor creates an unreasonable and substantial risk of the prescribed harm and the actor is aware of that risk.

The expanded definition of criminal recklessness, coupled with the creation of a specific omissions liability statute which imposes criminal liability on certain responsible persons who fail to protect children from sexual assault, physical abuse, mental harm or incest, replaces the current failure to act provisions of ch. 948, Stats., crimes against children.

In addition to replacing the current failure to act provisions of ch. 948 with the omissions liability and criminal recklessness provisions, the Bill: (1) deletes provisions of current law which impose criminal liability on persons responsible for the child's welfare whose failure to act exposes the child to the risk of a proscribed harm, regardless of whether the exposure results in actual harm to the child; and (2) deletes a provision of current law which recognizes a defense to a violation of the physical abuse of a child statute based on treatment of the child by spiritual means through prayer.

PART V

DESCRIPTION OF 1991 SENATE BILL 180

A. BACKGROUND

1. "Sexual Contact" and "Sexual Intercourse"

Various members of the Special Committee expressed concern that the current definitions of "sexual contact" and "sexual intercourse" applicable to the sexual assault laws are unnecessarily complex and difficult to understand and have caused problems in judicial interpretation. The current definitions in s. 940.225 (the general sexual assault statute) are as follows:

> "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1) [s. 940.225 (5) (b)].
>
> "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required [s. 940.225 (5) (c)].

Chapter 948 (crimes against children) has its own definitions of "sexual contact" and "sexual intercourse," including s. 948.02, relating to sexual assault of a child. These definitions are substantially the same as those applicable to s. 940.225, except:

a. The definition of "sexual contact" in s. 948.01 (5): (1) does not contain the alternative element, contained in s. 940.225 (5) (b), that provides that an intentional touching is sexual contact "if the touching contains the elements of actual or attempted battery under s. 940.19 (1)"; and (2) states more clearly than is stated in s. 940.225 (5) (b) that the intentional touching must be either for the purpose of sexually degrading

or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

b. The definition of "sexual intercourse" in s. 948.01 (6) states clearly that the term means "vulvar penetration." The definition in s. 940.225 (6) merely states that the term "includes the meaning" under s. 939.22 (36) (i.e., "'Sexual intercourse' requires only 'vulvar penetration'").

In addition to the definitions of "sexual contact" and "sexual intercourse" under s. 940.225 (general sexual assault), and ch. 948 (crimes against children), there are definitions of these terms in s. 939.22, the general definition section applicable to the Criminal Code. These definitions apply to any other provisions of the Criminal Code which use those terms [s. 939.22 (34) and (36)].

An example of some of the difficulties the current definition of "sexual intercourse" has caused is indicated by a 1987 Dane County Circuit Court decision, State v. Stevens (Docket No. 86-CF-866; dated January 30, 1987). In that case, the trial court judge dismissed a criminal charge of second-degree sexual assault involving a consensual act of intercourse between a female defendant and a minor male victim. The second-degree sexual assault statute, s. 940.225 (2) (e), 1987 Stats., provided that it is a Class C felony to have "sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years" (emphasis added).

In the Stevens case, the district attorney elected to pursue the second-degree sexual assault charge based only on an allegation of sexual intercourse, omitting any allegation of sexual contact. The judge dismissed the case based on his interpretation of the definition of sexual intercourse contained in s. 940.225 (5) (b). The judge held that the language "either by the defendant or upon the defendant's instruction" in the definition referred to the entire definition of acts constituting sexual intercourse. Thus, in order to come within the definition of sexual intercourse, the insertion of any body part or of any object into the genital or anal opening must be by the defendant or upon the defendant's instruction.

Applying this interpretation to the facts of the case, the judge held that, where the state is unable to prove that the defendant instructed the victim to engage in intercourse, a consensual act between a male victim (even a minor victim, where lack of consent is not an element of the crime of first- or second-degree sexual assault) and a female defendant does not constitute sexual assault involving sexual intercourse.

2. "Consent"

Substantial concern was also expressed by Committee members regarding the current definition of "consent" in s. 940.225 (the general sexual assault statute) and its emphasis on requiring that for a violation to occur, there be words or overt actions on the part of the victim indicating no consent. The current definition in s. 940.225 (4) reads as follows:

> "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
>
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

According to a memorandum from Committee member Professor David Schultz, regarding discussion in a 1987 ad hoc committee on the sexual assault laws (established by Senator Adelman):

> The definition of "without consent" [proposed by the ad hoc committee] is the most important of all. It is in connection with it that the views of [author] Susan Estrich that "no should mean no" were explored [by the ad hoc committee]. The problem with the present Wisconsin definition is that it does not say "without consent means no." It says, in effect, "without consent means no words or overt actions indicating no." (Emphasis added.) This appears to be a substantial difference that one expects would be more aggressively pursued on behalf of defendants than it apparently has been. That is, one would expect the argument that there is consent under the definition if there were any words or overt actions indicating consent, even though there may not have been consent in fact. This is exactly

contrary to the Estrich, and the common sense, approach.

B. MAJOR PROVISIONS

1. "Sexual Contact" and "Sexual Intercourse"

1991 Senate Bill 180: (a) revises the definitions of "sexual contact" and "sexual intercourse" as those terms are used in ss. 940.225 (the general criminal sexual assault laws) and 948.02 (the child sexual assault laws), in order to remove ambiguities and make the definitions more understandable; and (b) places the definition of "sexual intercourse" in the Criminal Code's general definition section in ch. 939 [and removes it from ss. 940.225 (5) (c) and 948.01 (6)] so as to make the definition applicable throughout the Criminal Code.

Under the Bill, the terms are defined as follows:

> "Sexual contact" means an intentional touching by the defendant of the intimate parts of the complainant, done for the purpose of causing bodily harm to the complainant, sexually degrading or humiliating the complainant, or sexually arousing or gratifying the complainant or the defendant. "Sexual contact" also means the touching of the intimate parts of the defendant by the complainant at the direction of the defendant, done for the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the complainant or the defendant. "Sexual contact" also means the touching by the complainant of the intimate parts of the complainant or of another at the direction of the defendant, done for the purpose of sexually degrading or humiliating the complainant or the other person or sexually arousing or gratifying the complainant or the other person or the defendant. The touchings under this paragraph may be done directly or through clothing, by the use of any part of the body or by the use of any object [s. 940.225 (5) (b)].
>
> "Sexual intercourse" means vulvar penetration, cunnilingus, fellatio or anal intercourse between persons or causing the intrusion, however slight, of any object into the genital or anal opening of any person, or of any person's penis into the

> mouth of any person. Emission of semen is not required [s. 939.22 (36)].

2. "Without Consent"

1991 Senate Bill 180 replaces the current definition of "consent" that is applicable to the general criminal sexual assault statute with the following definition of "without consent":

> "Without consent" means without freely given agreement in fact to have sexual contact or sexual intercourse. Without limitation by enumeration, agreement is not freely given under any of the following circumstances:
>
> 1. The defendant puts the complainant in fear by using or threatening imminent use of physical violence against the complainant, a member of the complainant's immediate family or any person in the complainant's presence. [The Bill defines "a member of the complainant's immediate family" to mean a spouse; a grandparent, parent, sibling, child, stepchild or grandchild of the complainant; or the spouse of a grandparent, parent, sibling, child, stepchild or grandchild of the complainant.]
>
> 2. The complainant does not understand the nature of sexual contact or sexual intercourse, by reason of the complainant's youth, ignorance or mistake of fact, or defective mental condition, whether permanent or temporary [s. 940.225 (5) (am) and (e)].

The new definition:

a. Emphasizes a "no means no" concept by specifying that there must be a freely given agreement "in fact" to have intercourse or contact and by not requiring that there be "words or overt actions" indicating a freely given agreement to have intercourse or contact.

b. Specifically establishes that consent is not freely given where the defendant puts the victim in fear by using or threatening imminent use of physical violence against the victim, an immediate family member of the victim or any person in the victim's presence. These are situations which frequently occur, but are not specifically set forth in the current definition of "consent."

c. Replaces that part of the current definition of "consent" which creates a rebuttable presumption that the following persons are incapable of consent: (1) a person suffering from a mental illness or defect which impairs capacity to appraise personal conduct; or (2) a person who is unconscious or for any other reason is physically unable to communicate unwillingness to act. The new definition:

> (1) Removes the presumption and states that, for the persons listed in the new definition, agreement to have intercourse or contact is not freely given;
>
> (2) Revises the current language describing the types of persons who are not deemed to consent to sexual intercourse or contact as a result of their circumstances. For example, the current reference to a "person suffering from a mental illness or defect which impairs capacity to appraise personal conduct" is replaced by a complainant who does not understand the nature of sexual intercourse or contact "by reason of...defective mental condition, whether permanent or temporary"; and
>
> (3) Adds to this provision complainants who do not understand the nature of sexual intercourse or conduct by reason of youth, ignorance or mistake of fact.

The Special Committee decided not to put this definition in the Criminal Code's general definition section because the current general definition of "without consent," in s. 939.22 (48), contains language which is specifically directed at property and other crimes. Thus, under the Bill, the new definition of "without consent" applies only to the general sexual assault statute, s. 940.225, Stats.

PART VI

DESCRIPTION OF 1991 SENATE BILL 181

A. BACKGROUND

In recent years, advocates for sexual assault victims in several states (Iowa and Michigan in particular) have been concerned that the civil justice system was being used to circumvent the rape shield law and obtain evidence regarding the victim's sexual conduct history that would be inadmissible in criminal court. This concern led to the recent enactment of legislation in Iowa and Michigan. The provisions in the Iowa Code, also enacted in 1990, are similar to those in Senate Bill 181 and served as the basis for that Bill [s. 668.15, Iowa Code].

B. MAJOR PROVISIONS

1991 Senate Bill 181 creates limitations on the discovery of information concerning a sexual assault victim's past sexual conduct in civil actions based upon conduct which constitutes sexual assault as defined in the criminal sexual assault statutes [s. 940.225, general sexual assault; s. 948.02, sexual assault of a child; s. 948.05, sexual exploitation of a child; and s. 948.06, incest]. The Bill defines "sexual conduct" to mean any conduct or behavior relating to sexual activities, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

The Bill specifies that, in such civil actions, a party seeking discovery of information concerning the sexual conduct of the victim of the sexual assault or exploitation with persons, other than the person who committed the alleged act of sexual assault, exploitation or incest, must establish all of the following:

1. Specific facts showing good cause for the discovery; and

2. That the information sought is relevant to the subject matter of the civil action or reasonably calculated to lead to the discovery of admissible evidence.

The Bill, if it becomes law, would first apply to civil actions commenced on the effective date of the law.

DLS:all:kjf:wu;wu

APPENDIX

COMMITTEE MATERIALS

Staff Materials

1. Staff Brief 90-4, Analysis of Current Wisconsin Laws Relating to Sexual Assault (July 24, 1990; revised September 5, 1990).

Other Materials

1. Memorandum from Sally L. Wellman, Assistant Attorney General, containing alternative language to the current rape shield statute (April 5, 1989).

2. Recommendations for Revision of the Rape Shield Statute [s. 972.11 (2), Stats.], offered by Senators Barbara Ulichny and Brian Burke (undated).

3. Memorandum from Michele LaVigne, Rape Shield Legislation, containing alternative language to the current rape shield statute (September 1990).

4. Law review article by Professor Frank Tuerkheimer, University of Wisconsin-Madison Law School, "A Reassessment and Redefinition of Rape Shield Laws," 50 Ohio State Law Journal, 1245 (1989).

5. "Proposed Revision of Federal Rule of Evidence 412," Federal Rules of Evidence: A Fresh Review and Evaluation, Committee on Rules of Criminal Procedure and Evidence, Criminal Justice Section, American Bar Association (120 F.R.D. 299, 340) (August 1987).

6. Letter from Professor Frank Tuerkheimer to Chairperson Ulichny, relating to Sally Wellman's concerns about his possible alternatives to the current rape shield law (September 19, 1990).

7. Memorandum, Revision of Sexual Assault Statutes, from Professor Dave Schultz to Senator Lynn S. Adelman, relating to changes in sexual assault laws suggested by the 1987 ad hoc committee established by Senator Adelman (August 28, 1990).

8. Memorandum, Chapter 948, Crimes Against Children, from Professor Dave Schultz to Shaun Haas, suggesting changes in the current law on failure to act in sexual assault of a child and other cases (May 10, 1989).

9. Draft of a Rape Shield Proposal, by Michele LaVigne and Sally Wellman (October 10, 1990).

10. "Rape Shield Draft A," by James Fullin and Professor Dave Schultz (October 18, 1990).

11. Memorandum from Sally Wellman, Assistant Attorney General, analyzing and critiquing Professor Frank Tuerkheimer's rape shield legislation contained in an Ohio law review article (see item 4, above) (June 20, 1989).

12. "Rape Shield Draft B," by James Fullin, Michele LaVigne, Professor Dave Schultz and Sally Wellman (November 19, 1990).

13. "Omission Liability Draft A," by James Fullin, Michele LaVigne, Professor Dave Schultz and Sally Wellman (November 19, 1990).

14. Letter from Judge John J. DiMotto, Milwaukee County Circuit Court Branch No. 41, to Chairperson Ulichny, relating to his analysis of proposals to revise the rape shield statute (October 17, 1990).

15. Written testimony of Gail Miles (October 18, 1990).

16. Written testimony of Karen Hoffman (October 18, 1990).

17. Letter from Gigi Stafne, Program Coordinator, Center Against Sexual & Domestic Abuse, Inc., Superior, to Shaun Haas, commenting on current sexual assault laws (October 18, 1990).

18. Letter from Christina Wildlake, Sexual Assault/Incest Services Coordinator, Family Advocates, Platteville, to Shaun Haas, commenting on need for help for incest survivors (undated).

19. Letter from Lisa L. Petersen, Sexual Assault/Domestic Violence Counselor, Passages Sexual Assault Program, Richland Center, relating to lack of sexual assault victims' rights and failure to prosecute sexual assault violators (October 25, 1990).

20. Report of Walworth County Children's Court Advisory Board, Child Sexual Abuse Proposals and Guidelines (September 1990).

21. Article, "Rape Law Reform Legislation: Practitioners' Perceptions of the Effectiveness of Specific Provisions," RESPONSE, Vol. 10, No. 4, pp. 3-8 (1987).